EUROPEAN CENTRAL BANK

EUROSYSTEM

EN **ECB-PUBLIC**

OPINION OF THE EUROPEAN CENTRAL BANK

of 11 December 2020

on limitations on cash payments

(CON/2020/33)

Introduction and legal basis

On 9 November 2020, the European Central Bank (ECB) received a request from the Danish *Finanstilsynet* (Financial Supervisory Authority) for an opinion on a draft law amending the Law on Danmarks Nationalbank, the Law on capital markets, the Law on measures to prevent money laundering and financing of terrorism, and various other laws[1] (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the second, third, fourth and fifth indents of Article 2(1) of Council Decision 98/415/EC[2], as the draft relates to means of payment, Danmarks Nationalbank, the collection of statistics, and payment and settlement systems. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose and description of the draft law

1.1 This opinion addresses the three parts of the draft law which: (a) lower the existing threshold for certain cash payments to professionals from a maximum of 50 000 DKK to 20 000 DKK (from approximately EUR 6 700 to EUR 2 700); (b) ensure that the opening of insolvency proceedings against a participant in a payment or securities settlement system does not prevent funds or securities available on the participant´s settlement account from being used to fulfil its obligations in the system on the day of the opening of insolvency proceedings; and (c) amend the Law on Danmarks Nationalbank[3] to ensure both an enhanced legal basis for Danmarks Nationalbank's collection and use of data, including for statistical purposes, and to strengthen the confidentiality requirements applicable to employees and members of the decision-making bodies of Danmarks Nationalbank, including when such data is shared with, inter alia, the ECB.

1.2 The lowering of the threshold for certain cash payments applies to professionals who are not covered by the scope of application of the Law on measures to prevent money laundering and

1 Forslag til lov om ændring af lov om en garantifond for skadesforsikringsselskaber, lov om investeringsforeninger m.v., hvidvaskloven og forskellige andre love.

2 Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

3 Lov om Danmarks Nationalbank, Lov nr. 116 af 7. april 1936. som ændret ved lov nr. 166 af 13. april 1938, § 44 i lov nr. 88 af 15. marts 1939, lov nr. 67 af 15. marts 1967, § 90 i lov nr. 174 af 30. april 1969 og § 16 i lov nr. 579 af 1. juni 2010.

financing of terrorism[4], and applies to this specific group of business-to-business payments and to customer-to-business payments. According to the explanatory notes to the draft law[5] (hereinafter 'explanatory notes'), the proposal is made with a view to combating money laundering and they refer to recital 6 of Directive (EU) 2015/849 of the European Parliament and of the Council[6] in this context, which provides, inter alia, that the use of large cash payments is highly vulnerable to money laundering and terrorist financing, and that Member States should be able to make additional general limitations to the use of cash and further stricter provisions. Further, the explanatory notes detail how continuous technological and digital developments have in general reduced cash payments of larger amounts, therefore the lowering of the threshold for certain cash payments is expected to have a limited impact on professionals and consumers.

1.3 The draft law also introduces the option given to Member States under Article 4 of Directive 98/26/EC of the European Parliament and of the Council[7], according to which the opening of insolvency proceedings against a participant in a payment or securities settlement system does not prevent funds or securities available on the participant´s settlement account from being used to fulfil its obligations in the system on the day of the opening of insolvency proceedings. The explanatory notes[8] clarify that currently and going forward, Danmarks Nationalbank provides a credit line (i.e. a guarantee) for settlements in VP Securities, the Danish national central securities depository. Settlements are processed either in real time or in batches (at fixed times during the day), and a credit line provided by Danmarks Nationalbank applies to real-time and dedicated batch settlement in VP Securities. National insolvency law provides that, in the case of insolvency proceedings opened against a participant, its settlement account at Danmarks Nationalbank is frozen and the participant is no longer able to dispose of its funds, which Danmarks Nationalbank can apply by way of security interest to secure the credit line provided. However, the explanatory notes state that Danmarks Nationalbank has joined TARGET2-Securities (hereinafter 'T2S'), the common platform for cross-border security settlements in Europe owned by the Eurosystem. T2S settles transactions mostly in real time on a delivery-versus-payment (DvP) basis, i.e. the money and securities change hands simultaneously and with finality in accordance with Directive 98/26/EC. Therefore, according to the explanatory notes, as a result of Danmarks Nationalbank's affiliation to T2S, doubts have arisen as to whether settlement in T2S is protected against the insolvency of a Danish participant in the course of a settlement day. In case of settlement failures due to insolvency in the course of a day, there is a risk that the failure to settle will have a knock-on effect in the system and create problems for other participants, which may undermine confidence that orders are executed in the system. It is therefore seen as important to ensure that resolution

4 Lov om forebyggende foranstaltninger mod hvidvask of finansiering af terrorisme, Lovbekendtgørelse nr. 380 af 2. april 2020.

5 See point 2.13.2 of the general comments to the draft law.

6 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ, L 141, 5.6.2015, p. 73).

7 Directive 98/26//EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166,11.6.1998, p.45).

8 See point 1.12.1 of the general comments to the draft law.

can take place in the event of bankruptcy through the funds made available on Danmarks Nationalbank's dedicated settlement account. Ultimately, failure to settle due to bankruptcy is seen a possible cause for mistrust in the financial system.

1.4 Finally, the draft law contains two amendments to the Law on Danmarks Nationalbank.

1.5 The first amendment proposes to establish an enhanced legal basis for the Danmarks Nationalbank to collect and use data for purposes falling within its fields of competence. The explanatory notes state that data collection undertaken today by Danmarks Nationalbank is understood mainly to take place with a view to producing statistics. According to the draft law, Danish undertakings registered in the Central Business Register will be obliged, upon request by Danmarks Nationalbank, to provide all data necessary for the Danmarks Nationalbank in order for it to fulfill its objectives as defined in the Law on Danmarks Nationalbank. As stated in the explanatory notes[9], the assessment of what information it is necessary to obtain from the undertakings will depend on Danmarks Nationalbank's actual performance of its tasks, and the Danmarks Nationalbank therefore arguably has considerable discretion to decide what data is relevant for the fulfilment of its objectives. According to the explanatory notes[10], data will be collected for conclusions and decisions taken by the Danmarks Nationalbank in relation to the monitoring of the Danish economy, financial stability, including credit risk, systemic risk, the capital and foreign exchange markets, and the establishment of financial statistics.

1.6 The second amendment to the Law on Danmarks Nationalbank introduces a specific professional confidentiality regime for the employees and members of the decision-making bodies of Danmarks Nationalbank, including external hired help, an obligation which in all cases continues to apply after the end of the provision of services[11]. This confidentiality regime entails that these persons must keep confidential information, which they become aware of when executing their duties, confidential. In case of a breach, the Criminal Code[12] applies, as a result of which fines or imprisonment of up to 6 months, which in case of aggravating circumstances can be up to 2 years, can be imposed. The draft law maintains the existing rules on the transmission of confidential information to central banks in the European System of Central Banks (ESCB) and the European Systemic Risk Board (ESRB), and also introduces an exhaustive list of other domestic, European and international bodies and institutions, including central banks located in other European Economic Area (EEA) countries, to whom confidential data may be transmitted. The draft law further provides that persons who receive confidential information from Danmarks Nationalbank, including persons at ESCB central banks, are bound by the same professional secrecy obligation applicable to the employees and members of the decision-making bodies of Danmarks Nationalbank. According to the explanatory notes[13], the performance of tasks relating to international statistical cooperation may also be carried out either on the basis of European Union

9 See point 2.20.3 of the general comments to the draft law.

10 See point 2.20.2 of the general comments to the draft law.

11 See 20.1 to 20.3 of the amended Law on Danmarks Nationalbank (Lov om Danmarks Nationalbank).

12 See Sections 152 to152e of the Criminal Code, Straffeloven, Lovbekendtgørelse nr. 976 af 17. september 2019.

13 See point 2.21.2 of the general comments to the draft law.

regulations or, in the case of the Bank for International Settlements and the International Monetary Fund, on the basis of an agreement concluded with these organisations.

2. Cash limitation

2.1 The ECB notes that Denmark has an exemption from participating in the third stage of economic and monetary union[14]. Against this specific institutional backdrop, the ECB has prepared an assessment of the relevant provisions of the draft law against relevant practices in the euro area, in particular the legal requirements for the euro and the legal tender status of euro banknotes.

2.2 Under the Treaty, the ECB has the exclusive right to authorise the issue of euro banknotes within the Union[15]. The euro banknotes issued by the ECB and the national central banks of the euro area are the only banknotes with legal tender status within the Union[16].

2.3 The scope and effects of the legal tender status of euro banknotes and coins has not yet been defined in Union law. According to Commission Recommendation 2010/191/EU[17] (hereinafter the 'Commission Recommendation'), the concept of legal tender of the euro should rely on three main elements. First, there should be a mandatory acceptance of banknotes and coins unless the parties have agreed on other means of payment. The acceptance of euro banknotes and coins as a means of payment in retail transactions should be the rule. A refusal to accept cash should be possible only if it is based on reasons related to the 'good faith principle'. Second, banknotes and coins should be accepted at full face value. Third, banknotes and coins should have the power to discharge debts.

2.4 The ECB notes that cash continues to play an important role in society irrespective of the fact that electronic payment instruments are increasingly used for retail payments in Member States, including Denmark[18]. As digital transformation progresses rapidly, Denmark is currently among the most digitalised countries in the world[19], which, inter alia, enables the use of alternative means of payment. While in 2009 cash payments accounted for 48% of the total number of payments in physical trade in Denmark, the 2019 figure was down to 16%[20]. It is recognised, however, that the ability to pay in cash remains particularly important for certain groups in society that, for various legitimate reasons, prefer to use cash rather than other payment instruments. These groups include not only elderly people but also some disabled citizens, immigrants, socially vulnerable citizens, minors and others with limited or no access to digital payment services[21]. The ECB notes, however, that the use of cash is declining in Denmark, also e.g. by elderly people, as cash

14 See Protocol (No 16) to the Treaty on certain provisions relating to Denmark.

15 Article 128(1), first sentence, of the Treaty and Article 16, first sentence, of the Statute of the European System of Central Banks and of the European Central Bank ('Statute of the ESCB').

16 Article 128(1), third sentence, of the Treaty and Article 16, third sentence, of the Statute of the ESCB.

17 Commission Recommendation 2010/191/EU of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (OJ L 83, 30.3.2010, p 70).

18 See paragraph 2.4 of Opinion CON/2017/8. All ECB Opinions are published on EUR-Lex.

19 See page 2 of Danmarks Nationalbank's report 'Danes primarily opt for electronic payment solutions', September 2020.

20 See page 9 of Danmarks Nationalbank's report 'Cash payments are declining', February 2020.

21 See paragraph 1.5 of Opinion CON/2019/41.

payments as a share of the total number of payments broken down by age shows that people in the age group 70-79 years in 2017 used cash in 40% of their payments in physical trade, a number that had declined to 22% in 2019[22]. Still, cash is generally appreciated as a payment instrument because it is widely accepted, fast and facilitates control over the payer's spending. In addition, it is the only payment instrument that allows citizens to settle a transaction directly, without relying on a third party service provider. Furthermore, the transaction can be settled in central bank money instantly and at face value, without the legal possibility of imposing a fee for the payment in question[23], appreciating that surcharges on card payments are also now prohibited by Union law[24]. Moreover, cash payments facilitate the inclusion of the entire population in the economy since it may be used to settle any type of financial transaction[25].

2.5 The Commission Recommendation states that the acceptance of payments in cash should be the rule, as noted above, but acknowledges that cash may be refused for reasons related to the good faith principle, without this being a breach of the legal tender status of cash. Neither Union law nor the Commission Recommendation explicitly addresses if and to what extent it may be permissible to introduce a more general limitation to the obligation to accept euro cash payments. Therefore, Union law has to be interpreted in order to ascertain the conditions that a limitation on payments in euro notes and coins must fulfil, including which conditions should be fulfilled to comply with the legal tender status of euro banknotes and coins when introducing general limitations to the obligation to accept cash payments. In particular, with respect to limiting cash payments, recital 19 of Council Regulation (EC) No 974/98[26] should be taken into consideration. This recital states that limitations on payments in notes and coins, established by Member States for public reasons, are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means for the settlement of monetary debts are available. The prevention of money laundering and financing of terrorism qualifies as a public reason outweighing the impact of the limitations on cash payments[27].

2.6 However, limitations on cash payments should also be effective and proportionate to the objectives pursued and should not go beyond what is necessary to achieve such objectives[28]. This requires, inter alia, that, for the settlement of monetary debts other lawful means of payment are available. These other lawful means of payment should be readily accessible to all citizens in the respective Member State. Any negative impact of the proposed limitations should be carefully weighed against the anticipated public benefits.

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22 See page 9 of Danmarks Nationalbank's report 'Cash payments are declining', February 2020.

23 See paragraph 2.1.6 of Opinion CON/2020/17.

24 See Article 62 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35).

25 See paragraph 2.1.6 of Opinion CON/2020/17, paragraph 2.6 of Opinion CON/2019/4, paragraph 2.7 of Opinion CON/2017/40, paragraph 3.4 of Opinion CON/2017/20, and paragraph 2.8 of Opinion CON/2017/27.

26 Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 11.5.1998, p. 1).

27 See paragraph 2.2 of CON/2013/9.

28 See paragraph 2.1.5 of Opinion CON/2020/17 and paragraph 2.3 of Opinion CON/2019/4.

2.7 With respect to the requirement for limitations to be proportionate, the ECB notes that the broader and more general a limitation is, the stricter should be the interpretation of the requirement for the limitation to be proportionate to the objective pursued. When considering whether a limitation is proportionate, the adverse impact of the limitation in question should always be considered and it should also be considered whether alternative measures could be adopted that would fulfil the relevant objective with a less adverse impact[29].

2.8 Finally, it is of relevance to note in this context that Directive 2014/92/EU of the European Parliament and of the Council[30] has made it easier for Union citizens to obtain payment accounts and related electronic payment services as an alternative to cash[31].

2.9 In respect of the lowering of the threshold for certain cash payments, the proposal follows a previous reduction in the threshold amount in 2013, when it was reduced from DKK 100 000 (approximately EUR 13 500), to the current threshold of DKK 50000.[32] At the time, the ECB noted[33] that any impact of the proposed provisions should be carefully weighed against the public benefits expected to be derived from them. Also, in view of the fact that the measures affect relatively low value payments, competent authorities should ensure that the effects of these measures do not go beyond what is necessary for achieving the objective of combating money laundering and financing of terrorism. The explanatory notes do not clarify what the impact has been of the lowering of the threshold for certain cash payments since its introduction and adoption in 2013. The explanatory notes also do not clarify why, seven years after the lowering of the threshold for certain cash payments, the threshold needs to be further reduced to just around one fifth of the pre-2013 threshold.

2.10 However, the ECB acknowledges that other lawful means for the settlement of monetary debts with similar benefits to those of cash are generally available in Denmark also above the proposed threshold of approximately EUR 2 700. Moreover, as noted in paragraph 1.2, the proposal to further lower the threshold for certain cash payments applies only to professionals who are not covered by the scope of application of the Law on measures to prevent money laundering and financing of terrorism, when receiving cash. Thus, the lowering of the threshold applies only to this specific group of business-to-business and customer-to-business payments. In this respect, the ECB welcomes the fact that this restriction is not intended to apply to payments between consumers. Taking this into account, and in addition to the above general observations, the lowering of the threshold for certain cash payments as set out in the draft law could be deemed proportionate to the objectives pursued[34] and to not go beyond what is necessary to achieve such objectives. However, the ECB cannot elaborate on the effectiveness of the draft law on this point, since no substantiation has been provided to this effect in the explanatory notes, and since the

29 See paragraph 2.1.5 of Opinion CON/2020/17.

30 Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ L 257, 28.8.2014, p. 214).

31 Directive 2014/92/EU has been implemented in Denmark by Law No 375 of 27 April 2016 (Lov om betalingskonti).

32 See Opinion CON/2013/9.

33 See paragraph 2.3 of Opinion CON/2013/9.

34 See paragraph 2.5 of Opinion CON/2019/46.

effect of the above 2013 reduction of the cash limitation ban has not been clarified. Also, in case of contingencies where alternative means of payment are temporarily not functioning, flexibility should be ensured for the settlement of payment obligations in cash.

3. Settlement finality in case of insolvency of system participants

Directive 98/26/EC is decisive for ensuring harmonised rules on irrevocability of payments and securities transactions across the Union, thereby helping to avoid systemic risks in the financial system. The Directive ensures that collateral security is insulated, on the day of the insolvency of a participant in a system, from the effects of the insolvency law applicable to that participant. The ECB agrees with the arguments made in the explanatory notes to the effect that the unwinding of a settlement in a securities settlement system may have a negative impact on the stability of financial markets and institutions in general, and arguably in particular for interconnected systems like T2S. The irrevocability of transfer orders is a prerequisite for the smooth and efficient functioning of T2S in the event of a participant becoming insolvent in the course of a settlement day. For these reasons the ECB strongly welcomes the draft law's proposed amendments to Danish law to ensure settlement finality in case of the insolvency of a system participant.

4. Collection and confidentiality of data collected and shared by Danmarks Nationalbank

4.1 The ECB welcomes the provisions of the draft law enhancing the legal basis for the Danmarks Nationalbank to collect and use data for purposes falling within its fields of competence, including but not limited to the production of financial statistics. The proposed provision is formulated very broadly allowing the Danmarks Nationalbank flexibility to define the required data depending on the task it is undertaking to fulfill its objectives.

4.2 The ECB also welcomes that the existing rules on the transmission of confidential information to central banks in the ESCB and the ESRB are maintained, and that the draft law extends the transmission of confidential information to other domestic, European and international bodies and institutions, including central banks located in other EEA countries.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 11 December 2020.

[signed]

The President of the ECB

Christine LAGARDE